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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Abram Flaxer, prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia convicting petitioner of violating 2 U. S. Code, sec. 192, by refusing to produce records called for by a subpoena of the Senate Internal Security Subcommittee.

OPINIONS BELOW

The opinions issued in connection with the original decision below (R. 96-114) are reported at 98 App. D. C. 324, 235 F. 2d 821, and also appear in Appendix B of this petition. The opinions issued on the second

decision, following remand of the case by this Court for reconsideration, have not yet been reported. They appear at R. 116-120 and also in Appendix C of this petition.

JURISDICTION

The judgment below (R. 121; Appendix A, *infra*) was entered on April 3, 1958. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction of a union president for contempt of Congress for refusing to produce to the Senate Internal Security Subcommittee the names and addresses of the 35,000 members of his labor union may be sustained, there being no evidence of the subject under inquiry, of the pertinency of the documents demanded, of the purpose for which the subcommittee desired the names, or of the use to which the names would be put, and no showing of a legislative purpose for the demand.

2. Whether it was permissible for the court below to find pertinency and a legislative purpose in the absence of evidence on the subject, by conjecturing that the Subcommittee desired the names of the Union's members in order to check them "against a list of subversives to determine the extent of infiltration into the union."

3. Whether the purpose conjectured by the court below is a valid legislative purpose and consistent with the Constitution.

4. Whether the authority of the Internal Security Subcommittee is so vague that it may not constitutionally support the use of compulsory process.

5. Whether the conviction was invalid because petitioner objected at the Subcommittee hearing that the demanded documents were irrelevant and served no legislative purpose, and yet the Subcommittee failed to state the subject under inquiry, the pertinency of the documents, or the legislative purpose.

6. Whether under the Senate rules and the Senate resolution establishing the Subcommittee, one member of the Subcommittee constituted a quorum for the purpose of ruling on objections to the validity of a subpoena duces tecum to produce the names and addresses of 35,000 members of a labor union.

7. Whether petitioner was guilty of a wilful default for the failure to produce the membership lists at a hearing at the conclusion of which he was directed to produce the documents not then and there, but within ten days.

STATUTES AND RESOLUTIONS INVOLVED

Rev. Stat., Sec. 102, as amended, 2 U.S.C., sec. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16862) provides in part:

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpoenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpoenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall con-

stitute a quorum for the purpose of administering oaths and taking sworn testimony.

Senate Resolution 180, 81st Cong., 2d Sess. (96 Cong. Rec. 1284) amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

> 3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.
>
> (b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

The new matter introduced by Resolution 180 is subparagraph (b). Unless changed, the rules of one session of the Senate carry over into the next (R. 35).

STATEMENT OF THE CASE

This case was previously before this Court as No. 462, October Term, 1956, on petition for certiorari to review an affirmance of petitioner's conviction by a four-three vote of the court below, sitting in banc (Chief Judge Edgerton and Circuit Judges Bazelon and Fahy dissenting). On June 24, 1957, the Court granted the petition for certiorari, vacated the judgment below, and remanded the case for consideration in the light of *Watkins* v. *United States*, 354 U.S. 178, decided June 17, 1957 (R. 115). See *Flaxer* v. *United*

States, 354 U.S. 929. On the remand, the court below, again sitting in banc, reaffirmed the conviction by a vote of four to three (Chief Judge Edgerton and Circuit Judges Bazelon and Fahy again dissenting).

The Subcommittee Proceedings

On September 19, 1951, petitioner, then national president of a labor union, the United Public Workers of America (R. 39), was served with a subpoena duces tecum of the Subcommittee on Internal Security of the Senate Committee on the Judiciary (R. 37, 64). The subpoena directed production on October 5, 1951 of records of the Union[1] showing (1) certain financial data, (2) the names and addresses of all Union members employed by the federal government, and (3) the names and addresses of all Union members employed by any state, county or municipal government. The subpoena gave no indication of the subject matter of the inquiry. (R. 63-4.)

The Union had approximately 35,000 members, and since these were all government employees, compliance with the subpoena would have required petitioner to produce, in addition to financial information, the names and addresses of the Union's entire membership. Five percent of the members were federal employees, most of whom worked for the Bureau of Engraving, the Post Office and the Veterans Administration. The rest of the Union's members were employees of state, county and municipal governments, mostly the last. (R. 43-4, 53.)

The subpoena had been prepared and apparently sent to Senator McCarran, then Subcommittee chair-

[1] Erroneously named in the subpoena as "United Professional Workers of America" (R. 63, 42).

man, by two members of the Subcommittee staff, who were acting, so far as appears, without advance authorization or approval of the Subcommittee (R. 53-61).

Petitioner appeared before the Subcommittee on October 5, 1951. Only one member of the Subcommittee, Senator Watkins, was present. At the outset of the hearing, petitioner objected to the absence of a quorum. Senator Watkins overruled his objection. (R. 38-9.)

At the hearing, petitioner produced, as demanded by the subpoena, Union records showing the amount, source and place of deposit of the Union's funds and the organizations to which the Union had contributed during the preceding twelve months (R. 39-41). Petitioner was asked various questions about the Union, all of which he answered, including questions on its methods of operation, the number of its members, and where the members were employed (R. 43-46).

The petitioner objected, however, to those portions of the subpoena which demanded the production of the names and addresses of the Union's members. He argued that these demands invaded "the rights of unions to the privacy of their membership records" and that experience taught that invasions of this privacy served "to compile blacklists for the sole purpose of destroying unions" (R. 41). He added (R. 42):

> "Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and

the 'right to be let alone' which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

"I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpoena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists."

Petitioner said that he did not have the list of Union members with him because he considered the demand for the list to be improper. Senator Watkins then stated: "You are directed by the committee to produce those records according to the terms of the subpena." (R. 47.)

Petitioner immediately asked for reconsideration, urging that the subcommittee was violating a national policy, manifested in federal legislation, against an employer's asking the names of union members (R. 47-8). Senator Watkins replied: "I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ" (R. 48).

In reply to a question by Richard Arens, the Subcommittee's counsel, petitioner said that the informa-

tion called for could be compiled in a week (R. 49). The following then occurred (R. 49-50):

"Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. . . .

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

* * * *

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual

rights as well as trade-union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now . . .

* * * * *

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

* * * *

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them."

Petitioner did not supply the membership lists within the ten day period (R. 71).

At no time during the hearing did the Subcommittee state the subject of the inquiry, the purpose for which the subpoenaed membership lists was desired, or what use would or could be made of the lists by the Subcommittee.

The Court Proceedings

Petitioner was indicted on two counts. The first count charged that on October 5, 1951 (the date of the Subcommittee hearing) he had wilfully refused to produce the names and addresses of all Union members employed by the federal government. The second count charged that on the same date he had wilfully refused to produce the names and addresses of all Union members employed by any state, county or municipal government. (R. 2-3.)

At the trial, the government introduced the subpoena (R. 63-4), the transcript of the Subcommittee hearing (R. 38-50, 65-70), and testimony of Richard Arens, counsel for the Subcommittee (R. 32, 62). Arens testified that the Subcommittee had information that petitioner, the Union's secretary-treasurer, its former negotiations director, and "certain" members of its executive board were members of the Communist Party (R. 51-3). Neither Arens nor any other witness gave any testimony as to what was the subject under inquiry or the pertinency of the Union's membership list to any subject. Nor is there any evidence in the record of why the Subcommittee wished the names and addresses of the 35,000 union members or what use it intended to make of that information.

The trial court denied a motion for judgment of acquittal (R. 14-20). She instructed the jury as a matter of law that the Subcommittee was authorized to obtain from the petitioner the documents demanded by the subpoena, that the documents "were pertinent to the study and investigation that the subcommittee was making," and that "there was a quorum of the committee" (R. 89). She also instructed the jury, with the acquiescence of both parties (R. 79), that the question was whether there was a wilful default on October 5, 1951, when petitioner appeared before the Subcommittee, and that if he did not wilfully default at that time, the verdict should be not guilty even though the jury might believe that at some other time he did wilfully default (R. 91). Petitioner was convicted on both counts and sentenced to imprisonment for two months and a fine of $1,000.00 (R. 20-1).

The appeal was first heard below by a regular three-judge division of the Court of Appeals, composed of

Chief Judge Edgerton and Circuit Judges Miller and Fahy. Two members of this division, Chief Judge Edgerton and Judge Fahy, were eventually to vote to reverse the conviction. However, before the division had announced a decision, the Court of Appeals on its own motion ordered reargument before the court in banc. On June 21, 1956, the in banc court affirmed by a vote of four to three (R. 96-114).

As already shown, the Subcommittee had never stated, and no evidence had been introduced, of the subject of the inquiry or the pertinency of the documents demanded by the subpoena. The majority of the Court of Appeals, in an opinion by Circuit Judge Miller, held that the Subcommittee's inquiry was justified under the third clause of its enabling resolution, authorizing it to study and investigate the "extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence." It ruled that against the background of this provision and anti-Communist legislation "the pertinency of the membership list demanded by the subpoena is at once apparent... The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union, even though the names of state and local members are included." (Appendix B, *infra*, pp. 8-9.) The majority did not mention the fact that there was no evidence either that such a "list of sub-

versives" existed or that the Subcommittee desired the Union's membership list for checking against such a master list.

Chief Judge Edgerton and Judge Bazelon dissented on two grounds: (1) that petitioner had not been directed to produce the records on October 5, but on the contrary the Subcommittee chairman had made it clear that petitioner need not produce them till ten days later; and (2) under the Senate rules a single Senator did not constitute a quorum of the Subcommittee for the purpose of ruling on petitioner's objections to the subpoena. They stated that it was unnecessary to consider the contention that the demanded records were not pertinent. (Appendix B, *infra*, pp. 15-19.) Judge Fahy dissented on the no-quorum point, and made no reference to any other point in the case (Appendix B, *infra*, p. 19).

A similar division reaffirmed the conviction following the remand for consideration of the applicability of the *Watkins* case. The prevailing opinion, written by Judge Prettyman, joined by Judges Miller and Danaher, first held that this Court did not in *Watkins* "vitiate in toto the resolution of the House establishing the Un-American Activities Committee." It then stated:

> "As we pointed out upon remand in *Sacher*, the Senate resolution here involved is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion." (Appendix C, *infra*, p. 2.)

This statement represented an unexplained shift in the court's theory of the Subcommittee's authority for the inquiry. The first decision, as we have seen, was

based upon the third clause of the Subcommittee's authorizing resolution, that authorizing it to investigate "subversive activities." The *Sacher* opinion, relied upon by Judge Prettyman's opinion, expressly withheld consideration of this phase of the Subcommittee's authority, and held the Subcommittee resolution valid solely with respect to the first two clauses of the authorizing resolution, those authorizing investigation of the administration of the Internal Security Act of 1950 and "other laws relating to espionage, sabotage, and the protection of the internal security."[2]

On the question of pertinency, Judge Prettyman's opinion did not state what it considered the subject matter of the inquiry or what the documents demanded were pertinent to. It did not refer to the original theory of Judge Miller's opinion that the documents were pertinent because they "could be used to check against a list of subversives." Instead, it held:

> "Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry." (Appendix C, *infra*, p. 2.)

Judge Prettyman's opinion also ruled that it made no difference that the relevancy or purpose of the documents had never been disclosed at the Subcommittee hearing, on the grounds that petitioner had not ob-

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[2] The *Sacher* decision (App. D. C., No. 13302, decided Jan. 31, 1958) has not yet been reported. It is the subject of a petition for certiorari in No. 828, Oct. Term, 1957.

jected at the hearing to lack of pertinency. The opinion stated on this score:

> "Flaxer now seizes upon the word 'irrelevant', used by him in one answer, as support for his claim that he objected to the question upon pertinency grounds. The Chairman had pointed out that the Committee was in executive session and that the record would not be public upon presentation unless so ordered by the Committee. The whole of Flaxer's answer was: 'Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.' In using the word 'irrelevant' Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant." (Appendix C, *infra*, pp. 2-3)

The opinion did not mention that on two occasions before the answer quoted, petitioner had told the Subcommittee that he thought the records would be used as blacklists, and that the Subcommittee had never said anything to the contrary.

Judge Washington issued a separate opinion, which stated merely that he "concurs in the result, finding no impediment in *Watkins* or other controlling authority, to affirmance of the conviction" (Appendix C, *infra*, p. 3).

Judge Fahy, joined by Chief Judge Edgerton and Judge Bazelon, dissented on the grounds that *Watkins* fortified his previous views on the lack of a Subcommittee quorum, since *Watkins* required that a delegation to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient par-

ticularity (Appendix C, *infra*, pp. 3-5). Chief Judge Edgerton and Judge Bazelon also stated that they thought that the conviction should be reversed for the additional reason stated in their former dissent—namely, the absence of a direction to produce on the day of the Subcommittee hearing (Appendix C, *infra*, p. 5).

Although the case had been remanded for consideration in the light of *Watkins*, the court below did not attempt the "arduous and delicate task" of making an "accommodation of the congressional need for particular information with the individual and personal interest in privacy" (*Watkins*, at 198). It never considered what need or purpose the Congress had for the information, and in fact the record fails to disclose what legislative need or purpose the production of the information was meant to serve.

REASONS FOR GRANTING THE WRIT

1. This case involves the most extreme assertion of the legislative inquiry power which has yet been made. In sustaining petitioner's conviction, the court below has discarded recognized constitutional limitations on the inquiry power.

Never before has a labor union officer been convicted for refusing to produce to a Congressional committee the membership lists of his union. Never before, so far as we have been able to ascertain, has a committee made such a sweeping demand. The Subcommittee's unprecedented subpoena, insisted upon by a single Senator, sought to invade the privacy of the 35,000 individuals who were members of the Union. These were to be stigmatized by being listed in the archives of a committee operating in the area of internal se-

curity, and would thereafter be subject to public defamation at some crucial point in their affairs.[3] As stated in *Watkins* v. *United States*, 354 U.S. 178, 197, "Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy." The Subcommittee's subpoena also infringed the hard-won tradition of the American labor movement that labor unions should not be required to divulge the names of their members.

This wholesale intrusion into private affairs was not supported by any showing of a legislative purpose or of pertinency to a matter under inquiry, although such a showing is a constitutional prerequisite to a conviction for obstructing a legislative investigation. *Watkins* v. *United States, supra; Quinn* v. *United States*, 349 U.S. 155, 161; *Sinclair* v. *United States*, 279 U.S. 263, 296-7; *Kilbourn* v. *Thompson*, 103 U.S. 168. As stated in *Watkins*, "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the

[3] Jacob K. Javits, then Attorney General of New York, discovered on the eve of his nomination as a Republican candidate for the United States Senate, that he was being attacked as a security risk on the basis of testimony which had been received by this same Subcommittee. Senator Javits was eventually accorded the privilege of testifying before the Subcommittee in order to clear himself. See 1956 Cong. Quarterly Almanac, pp. 732-3; N. Y. Times, Sept. 4, 7 and 10, 1956. On April 4, 1957, E. Herbert Norman, Canadian Ambassador to Egypt, committed suicide following this Subcommittee's release of derogatory information it had received concerning him in closed hearings—Mr. Norman having been previously cleared of the accusations by his own government. The Canadian government sent a formal protest to this government, and the Department of State expressed its condolences and regrets. N. Y. Times, April 5, 11 and 13, 1957.

Congress. . . . No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress" (at 187). And, ". . . an investigation into individual affairs is invalid if unrelated to any legislative purpose" (at 198).

In *Watkins*, the Court set aside for lack of a legislative purpose an attempted invasion of the privacy of a few former members of the Communist Party, whom the witness had refused to name. The attempted invasion of privacy here makes that involved in *Watkins* pale into insignificance. Yet there is wholly absent here any showing of pertinency, legislative purposes or need. Neither at the Subcommittee hearing nor at the trial was there ever stated or shown the subject of the inquiry, the Subcommittee's purpose in demanding the membership list, or the use to which the list would be put. What is more, the Subcommittee chairman never negated the repeated assertions of the petitioner that the Union's membership list was to be used for blacklisting—clearly a nonlegislative purpose.

The court below originally held that the Subcommittee desired to match the names of the union members against a "list of subversives" in order to determine whether the Union had been infiltrated by "subversives." This holding was unsupported conjecture. Nothing of the sort was suggested by the Subcommittee or by the government's evidence. The only evidence which had any conceivable bearing on the subject of the inquiry was testimony that the Subcommittee had information that certain union officers were Communists. This fails to establish any legitimate purpose or use for the names of the 35,000 union members, nor does it support the court's remarkable supposition that the Subcommittee

has a master list of the "subversives" in the American population.

If a legislative purpose, no matter how fantastic, may be conjectured by the appellate court for any demand, no matter how extravagant, the principle that Congressional investigations must have a legislative purpose becomes merely a paper requirement. Yet this has now occurred for the jurisdiction in which most Congressional investigations are held and in a period when abuse of the inquiry power is most prevalent. See Barth, *Government by Investigation* (1955); Taylor, *Grand Inquest* (1955), especially c. IV; Chafee, *The Blessings of Liberty* (1956) p. 221; *United States* v. *Rumely*, 345 U.S. 41, 44; *Watkins* v. *United States, supra*, at 195.

Certiorari should be granted, therefore, so that this Court may determine whether the court below has eliminated the requirements of legislative purpose and pertinency to a defined subject under inquiry, thereby sanctioning an unlimited extension of the Congressional inquiry power.

2. If the court below could supply by conjecture a purpose for the Subcommittee's demand, a major question arises as to whether this was a valid legislative purpose.

By the lower court's reasoning, the Subcommittee has power to subpoena the names and addresses of the one and a half million members of the Teamsters Union, of the million members of the United Automobile Workers, and, for that matter, of almost any organization. For it can always be speculated that the Subcommittee desires to check the names of the organization's members against its master list of "sub-

versives." By the same reasoning, the Subcommittee could demand the names of all employees and subscribers to the *New York Times*, in view of its investigation in 1955 and 1956 of "security risks" on the staff of that newspaper.[4]

In this case, it is true, the Subcommittee had derogatory information about some of the organization's leaders. But if such a foundation is necessary, it is, under current conditions, child's play to supply it, particularly for a Subcommittee which can develop derogatory security information about a Republican Attorney General of New York, a Canadian ambassador to Egypt, and the New York Times.

The fact that the petitioner's Union was composed of government employees is of no consequence, since that factor was not relevant to the court's theory of pertinency (the Subcommittee, as we have shown, had no theory at all, or if it did, failed to disclose it). In any event, 95% of the members were employed by state, county and municipal governments, and, absent some showing of federal interest, were presumptively outside the scope of federal control or regulation. See *Newton* v. *Commissioners*, 100 U.S. 548, 549; *Kentucky* v. *Dennison*, 65 U.S. 66, 107; *Wilson* v. *North Carolina*, 169 U.S. 586, 594; *Florida* v. *United States*, 282 U.S. 194, 211-2.[5] If production of the membership lists

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[4] See N. Y. Times editorial, Jan. 5, 1956; 1956 Cong. Quarterly Almanac, p. 732; 1957 Annual Report of the Subcommittee, pp. 97, 100, 103-6; N. Y. Times, Jan. 5, 1956, Apr. 20, 1956; Wash. Post & Times-Herald, Jan. 5, 7 and 10, 1956, Apr. 24, 1956; *United States* v. *Peck*, 154 F. Supp. 603.

[5] Even if it be assumed that the Subcommittee was justified in demanding the names and addresses of the members of the Union who were federal employees, the conviction on both counts must be reversed unless the Subcommittee was also justified in demand-

of this Union can be compelled on the theory of the court below, then the membership lists of any union are subject to the same demand.

The importance of this case to the American labor movement as a whole is therefore apparent. This has been recognized in comments condemning the action against petitioner in editorials appearing in the May, 1952 issue of the *Catering Industry Employee,* official journal of the Hotel and Restaurant Employees and Bartenders Industrial Union, in the July 1952 issue of the *Carpenter,* official journal of the United Brotherhood of Carpenters and Joiners, and in a statement of policy issued by the Executive Board of United Packinghouse Workers of America, *The Road Ahead,* April 1953. These unions saw the issue in this case as follows:

> "The issue is this: do unions have the right, as the courts have repeatedly held, to hold their membership lists in privacy?
>
> "I think they do. I hope others will join me in speaking out in defense of that right before it is too late." (*Catering Industry Employee.*)
>
> "The right of privacy is something it took organized labor generations to achieve. It is something unions must maintain if the blacklist, labor spying and all the evils of fifty years ago are not to be brought back." (*Carpenter.*)
>
> "In his recent contempt conviction for refusing to turn his union membership lists over to a Con-

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ing the names and addresses of union members employed by state, county and municipal governments. Both demands were contained in one subpoena, and the petitioner cannot be found guilty of contempt for refusal to comply with the subpoena if any part of it was bad and called for matters not within the authority of the Subcommittee. *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221; *United States* v. *Patterson,* 206 F. 2d 433.

gressional investigating committee Abram Flaxer of the United Public Workers was supporting a principle on which any trade union leader would face jail rather than betray his trust." (*Packinghouse Workers* statement.)

Whether a Congressional committee has power to demand the membership lists of unions, particularly without a showing of pertinency and legislative purpose, is surely an important constitutional question, involving not merely the scope of the inquiry power generally, but also the First, Fourth and Fifth Amendments. Serious constitutional questions are also raised by the holding below that a legislative committee has authority to compile a "list of subversives" and thereby to justify an insatiable demand for names to check against the list. Nothing in the Constitution sanctions such a compilation, and the First and Fifth Amendments and the bill of attainder clause prohibit it.

3. Although the Court remanded this case for consideration in the light of *Watkins*, it is apparent that the court below has trivialized *Watkins* and repudiated its principles.

(a) Following the remand, the court below may have dropped—at least it did not repeat—its conjecture that the subpoenaed documents were pertinent because the names of Union members could be checked against "a list of subversives." But dropping this conjectured, non-legislative purpose still did not supply the showing of pertinency and legislative purpose required by *Watkins*. Despite the emphasis placed by *Watkins* on the need to ascertain the subject under inquiry, the court below on the remand still did not state what subject was under inquiry at the hearing petitioner attended. Of course, this omission was impelled by the fact that the record contains no evi-

dence on the question. Judge Prettyman's opinion states that petitioner knew the subject under inquiry because he produced the financial records which had been subpoenaed. This has no semblance of logic. Petitioner produced the financial records because he had no objection to doing so, just as Watkins answered some of the Committee's questions. Acquiescing to some demands does not demonstrate recognition of the question under inquiry in connection with these or other demands, nor did petitioner's production of some records in any way reveal the subject under inquiry or the pertinency of withheld records.

(b) Since the question under inquiry was not, and could not be, defined, it inevitably followed that the court below was unable to discharge its responsibility, recognized by *Watkins*, of weighing the legislative need for the information demanded against the invasion of privacy. *Watkins* stated (at 198-9):

> "Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. . . . *United States* v. *Rumely* makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly."

(c) *Watkins* held that the charter of the Committee on Un-American Activities is too vague to support compulsory process. The authority of the Internal Security Subcommittee is defined in three clauses, at least one of which—that relating to investigation of "subversive activities"—obviously suffers from the same vice and even the same indefinite terminology. (See *Watkins* at 202, 214; *United States* v. *Peck*, 154 F. Supp. 603.) Since the subject matter of the inquiry and the pertinency and purpose of the documents were never established, it is impossible to tell which of the authorizing clauses is applicable to the subpoena that was issued in this case. Hence petitioner's conviction should have been set aside on the ground that the subpoena may have been, and in all likelihood was, issued under an invalid authorization.

The court below met this problem in two ways, neither of which was sound. First, it refused to recognize that *Watkins* prohibits criminal enforcement of a subpoena issued under a vague authorizing resolution. Second, it switched its theory of the case so as to hold the subpoena sustainable under the first two clauses of the Subcommittee's charter, whereas it had previously relied on the third clause, of whose vulnerability it had not then been aware. Of course, this fluid transition from one source of authority to another simply furnishes another demonstration that the Subcommittee's demands had no defined legislative purpose.

(d) *Watkins* held as a requirement of due process that a witness before a committee "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent" (at 208-9), and that, "Unless the subject matter has been made to appear with indisputable clarity, it is the duty of the investigative body,

upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto" (at 214-5).

Even this elementary protection has been eliminated by the court below. The petitioner on two occasions stated his belief that the Union membership lists were being demanded for the purpose of compiling a blacklist to destroy the Union (R. 41, 49). He also stated that the demand was "an improper command" (R. 47). Blacklisting is not a proper legislative function or committee subject, since "there is no congressional power to expose for the sake of exposure" (*Watkins* at 200), "nor is the Congress a law enforcement or trial agency" (*Watkins* at 187). Hence, petitioner's statements about blacklisting and the "improper command" were obviously objections that the Subcommittee's demands were not germane to any legitimate Congressional purpose. The one-man chairman of the Subcommittee did not contradict the petitioner's assertions, nor did he state the subject of the inquiry or the pertinency of the records. Instead, he merely called attention to the fact that "for the present the records are to be delivered to the committee in executive session" (R. 49). Petitioner responded: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public" (R. 50). Thus petitioner's position was clear: If the records were to be made public, they would be used for an improper and impertinent purpose—blacklisting. If they were to be kept private, they would be "wholly irrelevant" even to the illegitimate purpose of blacklisting. Under any circumstances, the records could serve no valid purpose.

Petitioner, therefore, did challenge the pertinency and legislative purpose of the Subcommittee's demand. Since the Subcommittee did not then state the subject under inquiry and the manner in which the documents were pertinent thereto, *Watkins* requires that the conviction be reversed. Judge Prettyman's opinion on this point is simply blind to the facts of record. The opinion recognizes that petitioner objected that the documents would be irrelevant if they were not made public, from which it concludes that the petitioner's objection was to the documents being kept private! It fails to perceive that petitioner, by objecting that the Subcommittee wished to promulgate a public blacklist, was thereby objecting on grounds of lack of pertinency and legislative purpose if the lists were published. And it attaches no significance at all to petitioner's unequivocal statement that he did not see "any good purpose that these records would serve" if he were to produce them.

It is apparent that the court below is out of step with *Watkins*. Certiorari should be granted to correct this condition.

4. This case also involves an important question, never decided by this Court, as to what constitutes a quorum of a Senate committee for the purpose of ruling on objections to a subpoena duces tecum.

Under the Senate Rules and the Resolution which is the charter of the Subcommittee, at least one-third of the membership of a committee or subcommittee is necessary to constitute a quorum for the "transaction of business," except that a lesser number may be fixed by the committee or subcommittee "for the purpose of taking sworn testimony." See *supra*, pp. 4-5. The lesser number fixed by the Subcommittee here involved

is one Senator (R. 34). The question here is whether the smaller quorum authorized only to take sworn testimony is authorized to rule on objections to a subpoena duces tecum.

In the present case, a single Senator presided at the Subcommittee hearing at which petitioner appeared. He overruled petitioner's objection to the absence of a quorum, and, without consultation with any other members of the Subcommittee, overruled his objections to the production of the 35,000 names and addresses of members of his union.[6]

Three of the seven judges of the court below agreed that a full quorum was necessary to rule on petitioner's objections, and that therefore petitioner was not guilty of contempt, his objections not having been validly overruled, as required by *Quinn* v. *United States*, 349 U.S. 155.

The Senate Rule, if read literally, sustains the dissents and petitioner's contention, since the authority of the smaller quorum is limited to the taking of sworn testimony.[7] Furthermore, the legislative history supports a strict construction of the authority of a smaller quorum. The provision for a smaller quorum, made by an amendment to Rule XXV (Sen. Res. 180, 81st Cong., 2d Sess., *supra*, p. 5), was designed to meet the

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[6] The contents of the subpoena had not been considered by a full quorum of the subcommittee prior to its issuance, see *supra*, pp. 6-7.

[7] Thus Black's *Law Dictionary* (3rd ed., 1933) defines "testimony" as: "Evidence given by a competent witness, under oath or affirmation; as distinguished from evidence derived from writings, and other sources." To like effect: Ballentine, *Law Dictionary* (3d ed., 1948); Bouvier's *Law Dictionary* (Rawle's 3rd Rev., 1914).

specific situation created by *Christoffel* v. *United States,* 338 U.S. 84, and its sole purpose was to eliminate a defense of no-quorum to a perjury charge. It was not intended otherwise to enlarge the authority of the smaller quorum. The Report on the Resolution which provided for the smaller quorum stated (Sen. Rep. 1208, 81st Cong., 2d Sess., p. 1):

> "Adoption of Senate Resolution 180 is intended to meet the problems raised by the Supreme Court's decision [in *Christoffel* v. *United States, supra*] by authorizing each Senate committee and subcommittee hereafter to fix the number of its members which shall constitute a quorum for the purpose of taking sworn testimony. The resolution does not otherwise change the existing requirements pertaining to committee quorums contained in the Senate Rules or in the Legislative Reorganization Act of 1946."

Senator Hayden, who managed the Resolution on the Senate floor for the Committee on Rules and Administration, advised the Senate (96 Cong. Rec. 1284):

> "Mr. President, this resolution is designed to take care of the question of a quorum being present in committees when sworn testimony is to be taken and perjury may be committed. It is to prevent perjury."

Later, Senator Hayden stated (*ibid*): "The resolution merely has to do with the procedure before committees in order to cover the question of perjured testimony."

Standard rules of construction also require that the provision for a smaller quorum, being stated as an exception to a general rule, be construed strictly, so as to avoid having the exception nullify the rule. *Schlem-*

mer v. *Buffalo R. & P.R. Co.*, 205 U.S. 1, 10; *Piedmont & Northern Ry. Co.* v. *I.C.C.*, 286 U.S. 299, 311-2; *United States* v. *Dickson*, 1 Pet. 141, 165; *United States* v. *Scharton*, 286 U.S. 518, 521-2.

And as Judge Fahy's opinion after the remand points out, *Watkins* supports the principle that clarity and certainty are essential to the delegation of power to one-man subcommittees.

The treatment of the quorum point by the majority below was cavalier. The original majority opinion ignored the legislative history and purpose of the Senate quorum rule and merely quoted an inapposite passage from Wigmore. Following the remand, the affirming judges did not even consider the applicability of *Watkins* to this subject.

Many of the abuses of the investigative power have been laid to the use of one-man subcommittees. See Barth, *op. cit. supra*, pp. 203-4. The decision below extends to such one-man subcommittees, contrary to the Senate Rules, the power to insist on the production of records and documents, no matter how serious are the policy questions involved. Here a single Senator insisted on a demand which had never before been made by a body of the Congress and which affected 35,000 individuals. As Chief Judge Edgerton pointed out in his dissent, a full quorum "might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names" (Appendix B, *infra*, p. 18).

Certiorari should be granted to determine whether such sweeping authority has actually been committed to one-man subcommittees.

5. This case involves an important question on the applicability of the doctrine of *Quinn* v. *United States*, 349 U.S. 155, as to the necessity of a direction. The petitioner, after objecting to the validity of the subpoena, was directed by the sole Senator present to produce the list of names and addresses of union members. He continued to object, asking for reconsideration of this ruling, and as a result was ordered to produce the documents not on that date, but ten days later. The majority below held that he was guilty of contempt on October 5th, the date of the hearing,[8] thus making irrelevant Senator Watkins' extension of the subpoena date for production. Judges Edgerton and Bazelon held that under *Quinn* it was necessary to examine the entire proceedings, and that the issue of direction must be resolved on the basis of the final ruling made on petitioner's objections, and not on the basis of an intermediate ruling.

The minority view is clearly the only tenable one under the *Quinn* doctrine. A witness is not "clearly apprised that the committee demands his answer notwithstanding his objections" (*Quinn* at 166), on the basis of a direction made in the course of a colloquy which is altered at the end of further discussion. A witness can only reasonably conclude that he should

[8] The majority agreed with the petitioner's contention that under the indictment and under the case as tried (see *supra*, p. 11), petitioner was either guilty of contempt on October 5th or not at all, and that the issue of the production or non-production of the list of names after October 5th was not in the case. (Appendix B, *infra*, pp. 3-7.)

be guided by the last words of the committee and not by its earlier statements. Indeed, this Court in *Quinn* (at 166, ftn. 34) cited with approval the decision and opinion of the District Court in *United States* v. *Kamp*, 102 F. Supp. 757, in which the defendant was acquitted of contempt on the basis of a colloquy between the defendant and the committee substantially identical to that which occurred here.

CONCLUSION

This case involves important questions which have been decided by a four to three vote in a manner inconsistent with the Constitution and principles established by decisions of this Court. Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A—THE JUDGMENT BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1958

Criminal 1756-52

Filed Apr. 3, 1958

No. 12,027

ABRAM FLAXER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington and Danaher, Circuit Judges, sitting en banc.

Judgment

Pursuant to the judgment of the Supreme Court of the United States dated June 24, 1957, this case came on to be reheard before the Court en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this case be, and it is hereby, affirmed.

Dated: Apr. 3, 1958

Per Circuit JUDGE PRETTYMAN

Circuit Judge Washington concurs in the result.

Separate dissenting opinion by Circuit Judge Fahy, with whom Chief Judge Edgerton and Circuit Judge Bazelon concur.

Separate opinion by Chief Judge Edgerton and Circuit Judge Bazelon in support of reversal.

(Circuit Judges Bastian and Burger took no part in the hearing or decision of this case.)

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,027

ABRAM FLAXER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided June 21, 1956

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney at time of argument, and *Lewis Carroll* and *William Hitz*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges, sitting *en banc*. (Circuit Judges BASTIAN and BURGER took no part in the consideration or decision of this case.)

WILBUR K. MILLER, *Circuit Judge:* Indicted under 2 U. S. C. § 192[1] for willfully failing and refusing to pro-

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[1] The statute is as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter

duce at a Senatorial subcommittee hearing on October 5, 1951, certain records required of him by a subpoena *duces tecum* and found guilty by a jury, Abram Flaxer appeals.

The appellant was president of the United Public Workers, a union made up of employees of Federal, state and local governments. In 1951 the Subcommittee on Internal Security of the Senate Committee on the Judiciary received information indicating that he and the other national officer of the union and certain of its directors were members of the Communist Party. Since the organization was therefore apparently dominated at the top by communists, the subcommittee decided to conduct an investigation as to whether its membership was infiltrated by them. To that end, a subpoena *duces tecum* was directed to Flaxer, commanding him to appear before the subcommittee on October 5, 1951, and to bring with him, *inter alia*, a list of the union's members showing which were employed by the Federal Government and which by other governmental units.

The subpoena was served on Flaxer September 19, some two weeks before the date of the hearing. He appeared before the subcommittee on October 5 but did not bring with him the classified membership list, which he said he could have compiled in a week's time. Instead, he read to the subcommittee a previously prepared written statement setting forth his reasons for not obeying the subpoena in that respect, after which Senator Wat-

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under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

kins (who constituted the subcommittee) directed him nevertheless immediately to produce the required records. He did not do so, and obviously he could not then have produced the list, even had he been disposed to obey after his objections had been overruled, because he had disabled himself by not preparing it in advance. Then, since it was physically impossible for Flaxer to file on that day the list he had not assembled and which it would take him a week to prepare, the Senator ordered him to submit it within ten days. Flaxer responded that he would "have to take that under consideration." He did not submit the membership list to the subcommittee within ten days thereafter, and has never submitted it.

Following the hearing on October 5, the subcommittee filed Report No. 1336 as to Flaxer's contempt in refusing to answer certain questions and in failing and refusing to obey the subpoena *duces tecum*. The Senate adopted a resolution that the Report be certified "under the seal of the United States Senate, to the United States Attorney for the District of Columbia to the end that said Abram Flaxer may be proceeded against in the manner and form provided by law." Senate Resolution 295, 82d Cong., 2d Sess., adopted March 19, 1952.

Thereafter Flaxer was indicted for violating the Code provision to which we have referred by willfully failing and refusing to produce on October 5, 1951, the membership list called for by the subpoena. At his trial, the counsel who had interrogated him on this subject at the hearing was the only witness. Testifying for the Government, he read into the record the portion of the transcript of the appellant's testimony before the subcommittee which had to do with Flaxer's non-compliance with the subpoena *duces tecum*. The appellant did not testify in his own behalf. In charging the jury the trial judge submitted the question whether, *on October 5, 1951*, Flaxer willfully failed and refused to produce the records required by the subpoena. The verdict was that he com-

mitted the offense on that day as charged in the indictment.

As a reason for reversal the appellant says he was not *ordered* on October 5 to produce the records at the hearing then being conducted and that therefore under the *Quinn* and *Bart* cases[3] he could not be found guilty of a willful disregard of the subpoena, and was entitled to a judgment of acquittal. With respect to this the appellant says in his brief:

> Accordingly, the issue before the trial court was whether the appellant was guilty of contempt of the command contained in the subpoena by virtue of his conduct at the October 5 hearing. Manifestly, he was not. Under the doctrine of the *Quinn* and *Bart* cases, *supra*, the appellant could not be found guilty of a wilful default of the subpoena unless, after consideration of his objections to the validity of the subpoena, he was directed to produce the records. But he was not so directed. On the contrary, he was told that he need not produce the records then and there but should produce them within ten days. The appellant replied that he would take that order under consideration. In effect, the order contained in the subpoena was vacated, and a new order substituted. The issue of appellant's compliance with this new order is not involved, since the appellant was neither indicted nor tried for a failure to carry out that order. Since there was no direction to produce the records at the hearing, there was consequently no wilful default of the command contained in the subpoena.

The record not only does not support the purportedly factual statements in the above quotation from appellant's brief, but is directly to the contrary. After consideration of his objections to the validity of the subpoena, Flaxer was unmistakably directed to produce the membership list. He was not told he need not produce

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[3] Bart v. United States, 349 U. S. 219 (1955); Quinn v. United States, 349 U. S. 155 (1955).

the list then and there; the record will be searched in vain for even an intimation to that effect. When Flaxer had completed a lengthy statement of his objections, the following occurred at the hearing:

> Mr. Arens [counsel for the subcommittee]. But you do have the information?
>
> Mr. Flaxer. In a general sense, I think I have the information.
>
> Mr. Arens. And you have not complied with the command of the subpena to produce that information.
>
> Mr. Flaxer. I think it is an improper command, sir.
>
> Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?
>
> Mr. Flaxer. That is the reason I haven't got them.
>
> Senator Watkins. That is the main reason. You are directed by the committee to produce those records *according to the terms of the subpena.* [Our emphasis.][3]

The Senator could hardly have more clearly directed Flaxer, notwithstanding his objections, to produce the records on October 5. The direction was given in conscious compliance with the requirement of the *Quinn* and *Bart* cases, as Senator Watkins knew that Flaxer was unable to obey then and there because he had deliberately failed to prepare himself to do so. In fact, the witness had already said, "I have no such list with me." We conclude that, since there was an express direction to submit the membership list given after Flaxer's objections had been considered, he could be convicted of violating § 192.

The question is then whether the proof justified the jury's verdict that the appellant was in willful default on October 5. That his contumacy was complete on that day is clearly shown by his own testimony before the subcommittee. He testified he did not bring with him the membership records as the subpoena had commanded.

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[3] Official Reporter's Transcript, page 123.

Did he willfully fail to bring them, as the jury concluded? His own words and conduct answer the question in the affirmative. He could have compiled the membership list prior to the hearing, so that he might be ready to obey the subpoena should the subcommittee reject his objections and direct him to produce the records. He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstances. He stated at the hearing that he regarded "as an improper command" the subpoena's direction that he bring the records. "That is the reason I haven't got them," he said. This was deliberate and defiant contempt of the United States Senate on October 5, 1951.

It was not until after the appellant had been directed, despite his protest, to produce the records according to the terms of the subpoena, that the chairman ordered him to assemble the information and transmit it to the subcommittee in ten days. Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt — already complete — in disobeying the subpoena.[4]

If Flaxer had demonstrated good faith by compiling the membership records and sending them to the subcommittee within ten days, perhaps he would not have been indicted for his initial contempt. On that supposi-

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[4] In order to show the sequence of events and what actually happened at the hearing, we reproduce in an appendix to this opinion pertinent portions of Flaxer's testimony before the subcommittee regarding his failure and refusal to obey the subpoena with respect to the membership list.

tion some may think Senator Watkins—although he did not promise immunity in that event—was affording Flaxer an opportunity to purge himself of contempt. If so, it was an opportunity the appellant did not embrace. He remained recalcitrant, thus affirming and emphasizing the contempt he had originally displayed. That he may have committed another contempt in addition to that of October 5 would seem to be irrelevant.

We next consider the appellant's contention that he was entitled to a judgment of acquittal on his theory that a quorum of the subcommittee did not rule upon his objections to the validity of the subpoena. Senate Resolution 366,[5] which established the subcommittee, authorized it to provide that less than a majority should constitute a quorum "for the purpose of administering oaths and taking sworn testimony," and the subcommittee had decided that one member should constitute a quorum for that purpose. Flaxer argues that the authority to administer oaths and take sworn testimony does not include the authority to rule upon the validity of a subpoena.

The power to receive sworn testimony of course includes authority to rule on objections to questions asked the witness. Receiving documents is obviously a normal ancillary to taking testimony. Professor Wigmore says:[6]

> This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to *every form and material of evidence* whatever.
>
> In particular it applies to such evidential material as exists in a person's hands in the form of *documents*. "There is no difference in principle," said a great judge [Shaw, C. J., in Bull v. Loveland, 10 Pick. 9, 14 (1830)], "between compelling a witness to produce a document in his possession, under a subpoena 'duces tecum' (in a case where the party calling the witness has a right to the use of such

[5] 81st Cong., 2d Sess. (1950).

[6] 8 WIGMORE, EVIDENCE § 2193 (3d ed. 1940).

> document), and compelling him to give testimony when the facts lie in his own knowledge." This much is unquestionable; for to give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions.

We think authority to receive sworn testimony includes not only authority to rule on objections to questions but on objections to a subpoena *duces tecum* as well.

In considering appellant's further argument that the pertinency of the membership list called for by the subpoena was not established, it is essential first to ascertain what the subcommittee had been authorized and directed to do, and what it was doing or attempting to do in the hearing of October 5.

The Senate in 1950 authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate, among other things, the

> . . . extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence . . ..

The Committee was also directed to study the operation of the Internal Security Act of 1950 and other laws dealing with internal security.[7] In accordance with this authorization and direction there was created, in January, 1951, the Subcommittee on Internal Security.

In § 2 of the Subversive Activities Control Act of 1950[8] Congress graphically appraised the activities and

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[7] S. RES. 366, 81st Cong., 2d Sess. (1950), S. RES. 198, 82d Cong., 1st Sess. (1951) (continuing S. RES. 366).

[8] Title I of the Internal Security Act of 1950, 64 STAT. 987, 50 U. S. C. § 781.

purposes of the world communist "movement" and concluded that our form of government is in clear and present danger therefrom.[9] It was because of Congressional alarm reflected in that Act and other recent legislation that the subcommittee was authorized to study and investigate the extent, nature and effects of subversive activities, including the infiltration of labor organizations by persons who are or may be under communist domination. Against such a background, the pertinency of the membership list demanded by the subpoena is at once apparent. Cf. *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 132, 167 F. (2d) 241, 246, *cert. denied* 334 U. S. 843 (1948); *Marshall* v. *United States,* 85 U. S. App. D. C. 184, 176 F. (2d) 473 (1949), *cert. denied* 339 U. S. 933 (1950). The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union even though the names of state and local members are included. Regardless of where they were employed, the names of members were pertinent because an investigation of the union was pertinent.

As a final reason for reversal, appellant points out that the indictment charged him with refusing to produce certain records of the United Public Workers of America; that the subpoena served on him in fact called upon him to produce the records of the United Professional Workers of America. This variance, says Flaxer, between the allegation in the indictment and the subpoena actually served on him was in itself fatal to the prosecution and required a judgment of acquittal. The point is frivolous, since Flaxer himself called attention to the inadvertent

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[9] This was held to dispense with the need for proof—in a deportation case where the question was pertinent—that the Communist Party advocates the violent overthrow of the Government. Galvan v. Press, 347 U. S. 522, 529-530 (1954).

use of the word "Professional" for the word "Public" in naming the union in the subpoena. He said, "I want to make a minor correction there. Our union is the United Public Workers. . . . Your subpena stated 'Professional Workers.' I recognized it was an error in your identification."

We hold that Flaxer was fairly tried and that his guilt was clearly shown. The judgment pursuant to the verdict must stand.

Affirmed.

APPENDIX

Official Reporter's Transcript, pages 113-116:

Mr. Flaxer. . . . The item which I have not produced is the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to privacy of their membership records—

Mr. Arens. You are reading from a prepared statement?

Mr. Flaxer. Yes.

Mr. Arens. Who prepared the statement?

Mr. Flaxer. I did. (Continues:) Has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a union is an empty right unless the fact of membership can be kept private.

Throughout our history, employers and antilabor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the La Follette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the

National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present [one] constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Mr. Arens. Do you have such a list?

Mr. Flaxer. I have no such list with me.

Mr. Arens. Do the records of the United Professional Workers reflect such a list? Is the information available, in other words?

Mr. Flaxer. I want to make a minor correction there. Our union is the United Public Workers.

Mr. Arens. I meant the United Public Workers.

Mr. Flaxer. Your subpena stated "Professional Workers." I recognized it was an error in your identification.

Mr. Arens. Did the United Public Workers' organization have the information available which is called for in the subpena?

Mr. Flaxer. Well, we generally have such information.

* * * * *

Official Reporter's Transcript, pages 122-128:

Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpena duces tecum served upon him, the record[s] of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

Mr. Flaxer. *I think it is an improper command, sir.*

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. *That is the reason I haven't got them.*

Senator Watkins. That is the main reason. *You are directed by the committee to produce those records according to the terms of the subpena.*

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer asking for mem-

bership lists. You want your own employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir——

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know, sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him [*sic*]. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr.

Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

Mr. Arens. Who is the vice president of the United Public Workers?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Guinier.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any——

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them, I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. *But you have declined to produce it; is that correct?*

Mr. Flaxer. *I haven't produced them.*

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

[All emphasis supplied.]

EDGERTON, *Chief Judge*, with whom BAZELON, *Circuit Judge*, concurs, *dissenting*: On October 5, the date named in the subpoena, appellant appeared before Senator Watkins, the Chairman of the subcommittee. No other member was present. Appellant produced other records called for by the subpoena, but asked the Chairman to withdraw the demand for membership lists, explaining in effect that he considered the lists privileged. After some discussion the Chairman said: "You are directed

by the committee to produce those records according to the terms of the subpoena."

But the Chairman was immediately asked to reconsider this direction. The appellant said: "Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. . . ." The Chairman and the appellant proceeded to discuss the claim of privilege at some length. At the end of this discussion, which occupies a full page of the printed record, the Chairman said, ". . . I do not think any court would ever resolve itself against the United States finding out what organization its members belong to." Mr. Arens, committee counsel, said, "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time." The Chairman immediately said to the appellant, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date."

This seems to me a clear case of immediate reconsideration of an order followed by immediate substitution of a different order.

After some further discussion, the following colloquy occurred: "Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today? Mr. Flaxer. I will have to take that under consideration. Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them." The appellant never produced the records.

The indictment did not charge him with failing to produce the records within 10 days from October 5. It charged that appellant "on October 5, 1951 . . . willfully failed and refused to produce the records . . . ." The

case was tried on that theory alone. This colloquy occurred. "The Court. I expect to tell them to determine it as of the 5th, and that if they find there was no refusal and willful default on that date, that they must find him not guilty even though they believe that he defaulted at some other time. Mr. Hitz [Government counsel]. That's right. I believe that is the law." The court charged the jury: "you are to determine whether on that date, October 5, 1951, the defendant appeared before a subcommittee and then willfully failed and refused to produce the documents and then willfully did make default. If you find that he did not willfully make default at that time and place—that is, on October 5, 1951—then your verdict would be not guilty, even though you may believe that at some other time that he did willfully default. In other words, the question before you is whether there was a willful default on October 5, 1951, when he appeared before the committee."

In *Quinn* v. *United States*, 349 U.S. 155, 165-166, the Court said: "Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under §192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness's refusal to answer is not contumacious, for there is lacking the requisite criminal intent. . . . In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under §192 for refusal to answer that question." The present appellant was clearly apprised that notwithstanding his objections, the Chairman demanded that he produce the records *within 10 days from October 5*. He was not apprised that, notwithstanding his objections, he must produce the records on October 5.

On the contrary, the Chairman made it clear that he need not produce them on that date and production within 10 days from that date would suffice. It follows that here, as in the *Quinn* case, the District Court should have directed a judgment of acquittal.

The *Quinn* case—which the Supreme Court had not yet decided—requires reversal for another reason as well. Soon after the hearing before the Chairman began, the present appellant raised an objection to the subpoena. He said: "I produced all the items called for in the subpena except . . . the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. . . . Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. . . . I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists." Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e. the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and taking sworn testimony", but he was not a quorum for other purposes. The appellant, as soon as he was sworn, objected to the absence of a quorum. In many cases, including this one, the right to a quorum is more than a technicality. A quorum might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names.

In my view it is unnecessary to consider appellant's contention that the demanded records, particularly as to non-federal employees, were not pertinent to the committee's authorized investigation.

FAHY, *Circuit Judge*, dissents on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*.

APPENDIX C—OPINIONS BELOW AFTER REMAND

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12027

ABRAM FLAXER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States

Decided April 3, 1958

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Messrs. Lewis Carroll, John D. Lane* and *Harold D. Rhynedance, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges, sitting *en banc*. Circuit Judges BASTIAN and BURGER took no part in the hearing or decision of this case.

PRETTYMAN, *Circuit Judge:* In 1956 we affirmed the conviction of Flaxer for contempt.[1] The Supreme Court vacated our judgment and remanded[2] "for consideration in the light of *Watkins* v. *United States*".[3]

[1] Flaxer v. United States, 98 U.S. App. D.C. 324, 235 F. 2d 821.

[2] Flaxer v. United States, 354 U.S. 929, 1 L. Ed. 2d 1533, 77 S. Ct. 1392 (1957).

[3] 354 U.S. 178, 1 L. Ed. 2d 1273, 77 S. Ct. 1173 (1957).

In *Barenblatt*[4] upon similar remand we held that the Supreme Court in *Watkins* did not vitiate *in toto* the resolution of the House establishing the Un-American Activities Committee. We came to that conclusion for four reasons: (1) The Court did not say the resolution is invalid; (2) the Court discussed at length other points regarding pertinency, which discussion we deemed not to be *dictum*; (3) the Court cited and did not overrule a number of cases upholding convictions for contempt under the same resolution; and (4) the Court remanded the case to us for further consideration, a useless gesture if the resolution itself is invalid.

As we pointed out upon remand in *Sacher*[5] the Senate resolution here involved[6] is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion.

We have, then, only the questions posed by *Watkins* as to pertinency. Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions; he made an extensive statement of his position on that point.

Flaxer now seizes upon the word "irrelevant", used by him in one answer, as support for his claim that he

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[4] Barenblatt v. United States, —— U.S. App. D.C ——, ——, F. 2d —— (Jan. 16, 1958).

[5] Sacher v. United States, —— U.S. App. D.C. ——, —— F. 2d —— (Jan. 31, 1958).

[6] S. Res. No. 366, 81st Cong., 2d Sess. (1950).

objected to the question upon pertinency grounds. The Chairman had pointed out that the Committee was in executive session and that the records would not be public upon presentation unless so ordered by the Committee. The whole of Flaxer's answer was: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public." In using the word "irrelevant" Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant.

We affirm the judgment of the District Court.

Affirmed.

WASHINGTON, *Circuit Judge,* concurs in the result, finding no impediment in *Watkins,* or other controlling authority, to affirmance of the conviction.

FAHY, *Circuit Judge,* with whom EDGERTON, *Chief Judge,* and BAZELON, *Circuit Judge,* concur, dissenting: When the case was here before, prior to the *Watkins* decision of the Supreme Court, I dissented on the ground that the Internal Security Subcommittee of the Senate Committee on the Judiciary had empowered a subcommittee consisting of a single member to do no more than to administer oaths and to take sworn testimony.[1] This, I thought, did

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[1] Tr. 45-56. This action was in accordance with S. Res. 366, 81st Cong., 2d Sess., the resolution to which the Internal Security Subcommittee owes its authority. This resolution provides:

> A majority of the members of the [Judiciary] committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

96 Cong. Rec. 16872 (1950). See my dissent in *Sacher* v. *United States,* —— U.S. App. D.C. ——, —— F. 2d ——, n. 1.

not authorize the subcommittee consisting of the Chairman alone to rule upon appellant's objections to the production of documents called for by a subpoena *duces tecum* issued under authority of the parent Subcommittee. Contrary views prevailed in this court, after which the Supreme Court granted certiorari and remanded the case to us for reconsideration in the light of *Watkins*. 354 U.S. 929.

Under *Watkins* a delegation by Congress or by the Senate or the House of Representatives to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter." 354 U.S. at 201. There the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. Moreover, the reason for the particular character of the limited delegation is known. It was to avoid the defense of no quorum, that is, of no competent tribunal, in event a witness were prosecuted for perjury for testimony given under oath before a single member. See *Christoffel* v. *United States*, 338 U.S. 84. This purpose was accomplished by constituting one member a quorum to administer oaths and to take sworn testimony.

Like considerations fortify the dissenting opinion of Chief Judge Edgerton, in which Judge Bazelon concurred, when the case was here before. The Chief Judge stated,

> Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e., the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and taking sworn testimony", but he was not a quorum for other purposes.

98 U.S. App. D.C. 324, 334, 235 F. 2d 821, 831. "Other purposes" would include consideration of and decision upon appellant's repeated requests that he be not required to produce the membership lists called for by the subpoena *duces tecum*.

For these reasons I think the judgment of conviction should be reversed and the appellant discharged.

EDGERTON, *Chief Judge*, and BAZELON, *Circuit Judge*: Besides joining fully with Judge Fahy, we think the conviction should be reversed for the additional reason stated in our former dissent. 98 U.S. App. D.C. 324, 333, 235 F. 2d 821, 830.